Democratic rights protection: the case for weak judicial review implicit in the democratic critique of judicial review – RETRACTED

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Democratic critique of judicial review – A case for judicial review based on democracy – The unsuccessful case against weak judicial review based on democracy – The distinctive democratic qualities of courts – Contestability of political decisions – The argument for weak judicial review implicit in the democratic critique

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Introduction

The debate on judicial review of legislation and its compatibility with democratic ideals has resulted in the formation of two camps. Proponents of judicial review hold that a polity must defend the rights of individuals and minorities against unjust interference by ignorant or malicious majorities.[1] Opponents hold that judicial review of legislation encroaches upon the legislature's authority to legislate. Although it may protect minority rights, it is not uncommon for judicial review to create new constitutional rights. Such 'legislation by judges' is considered to be in conflict with democratic principles.[2] However, the alternative of weak judicial review is rarely taken into account – unjustly, as I

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[1] *See* e.g. R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996); C.L. Eisgruber, *Constitutional Self-Government* (Harvard University Press 2001); L.G. Sager. *Justice in Plainclothes: A Theory of American Constitutional Practice* (Yale University Press 2004).

[2] *See* e.g. L.D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press 2004); M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999); J. Waldron, *Law and Disagreement* (Oxford University Press 1999).

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will argue that weak judicial review can reconcile the concerns of the democratic critics with the enhanced rights protection that judicial review offers.

Richard Bellamy sits firmly in the camp of the opponents to judicial review. In *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, he staunchly argues against judicial review.[3] Bellamy rejects both strong and weak judicial review. The distinction between strong and weak judicial review, introduced by Mark Tushnet, indicates the differing degrees of judicial power in different polities.[4] 'Strong judicial review' refers to a system in which a court can strike down legislation judged to be in violation of higher law such as the constitution. 'Weak judicial review' refers to a model in which a court can judge legislation for its compatibility with higher law, but the legislature can either ignore its judgment or relatively easily overturn it.

Weak judicial review therefore allows for political disagreement with judicial review. This approach means that, instead of a court immediately invalidating legislation, legislatures have the option to disagree with its judgment, keeping the legislation nonetheless. In Canada, parliament can invoke a 'notwithstanding clause' that rejects the court's ruling and keeps the law in force, while in the United Kingdom parliament can choose to ignore a court's 'declaration of incompatibility', which holds that a law is incompatible with the Human Rights Act 1998. The form of weak judicial review that I have in mind in this article is more akin to the British system: a system in which a court can judge legislation but cannot strike it down. If a court judges the legislation to be in conflict with the constitution, it must refer that legislation to the legislature.[5] This prevents weak judicial review from becoming de facto strong judicial review due to legislative inertia. Whenever I use the term 'judicial review', it will refer to strong judicial review; weak judicial review will always be referred to by using the term 'weak judicial review'.

Bellamy's rejection of weak judicial review distinguishes him from the, arguably, 'standard case' against judicial review: Jeremy Waldron's seminal article 'The Core of the Case against Judicial Review'.[6] Waldron offers a persuasive

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[3] R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2010).

[4] M. Tushnet, 'Alternative Forms of Judicial Review', 101 *Michigan Law Review* (2003) p. 2781.

[5] It must be noted that the British system of judicial review is much more complex than this. It may even be misleading to characterise the British system as 'weak judicial review' due to certain other elements, such as the expansive scope for interpretation of legislation and the role of the European Court of Human Rights. *See* A. Kavanagh, 'What's so weak about "weak-form review"? The case of the UK Human Rights Act 1998', 13 *International Journal of Constitutional Law* (2015) p. 1008.

[6] J. Waldron, 'The Core of the Case Against Judicial Review', 115 *The Yale Law Journal* (2006) p. 1346.

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argument against strong judicial review but, by his own admission, his argument does not apply to weak judicial review.[7] Bellamy rejects judicial review *in total*, in contrast with both Waldron and another clear source of inspiration for Bellamy, republican philosopher Philip Pettit.[8] Bellamy's argument is therefore a fine basis to determine whether the democratic critique of judicial review really does preclude weak judicial review.

As I aim to find a basis for weak judicial review in the arguments of the democratic critics, I will contrast Bellamy's democratic critique of judicial review with a political theorist that defends judicial review on a democratic basis. I use Pierre Rosanvallon's *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* as this contrasting argument.[9] Rosanvallon's work is rarely used in the framework of legal theory, unjustly, as his perspective from political theory makes his work especially suited as a basis for a response to the democratic critique of judicial review.

Rosanvallon identifies several advantages to judicial review, as a supplement to electoral politics, that enable stronger claims to democratic legitimacy. I contend that the rationale that underlies these advantages is very similar, if not identical, to that which underlies the strengths that Bellamy attributes to electoral politics. This allows us to reassess Bellamy's argumentation: I will argue not only that Bellamy's argument against weak judicial review fails to convince but, surprisingly, also that we can make a case *for* weak judicial review on the basis of Bellamy's argumentation.

I will begin this article by describing Bellamy's arguments against judicial review and for legislative superiority. I will subsequently discuss Rosanvallon's analysis of electoral politics. This analysis clarifies the positive role that courts can play in democracies. In the following section, I argue that the elements of democracy that Bellamy praises cohere with Rosanvallon's analysis of contemporary democracy. Bellamy's view of democracy is therefore not incompatible with some form of weak judicial review. Next, I turn to the democratic credentials of courts. It is often argued by opponents of judicial review that courts lack democratic legitimacy. But even though they might possess less democratic legitimacy, courts are not simply 'undemocratic'. Moreover, there are

[7] Waldron, *supra* n. 6, p. 1354.

[8] P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1997), esp. Chapter 6. Although Pettit is more sympathetic to judicial review, he is not unequivocally in favour of the institution; it may be, he hypothesises, that judicial review 'work[s] for ill … in being overcautious and overcensorious of electoral and parliamentary choice': P. Pettit, 'Democracy, Electoral and Contestatory', in I. Shapiro and S. Macedo (eds.), *NOMOS XLII: Designing Democratic Institutions* (New York University Press 2000) p. 105 at p. 133.

[9] P. Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity*, trans. A. Goldhammer (Princeton University Press 2011).

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ways in which courts offer advantages unique to judicial procedures that can enhance democratic debates. In the penultimate section, I will argue that Bellamy's own argumentation actually justifies weak judicial review. However, Rosanvallon's case for judicial review is problematic as well. Most notably, his democratic case for judicial review cannot justify strong judicial review, as it is undermined by his analysis of the way in which judgment erodes a legislature's room to act.

In the conclusion, I contend not just that weak judicial review is worth considering more seriously,[10] but that it can actually be supported by the democratic critique of (strong) judicial review. The fact that one of the most uncompromising critics of judicial review provides a basis for weak judicial review in his argument, albeit inadvertently, gives the democratic critics food for thought.

Bellamy's case against judicial review

Richard Bellamy's argument against judicial review is directed against two claims generally made by its proponents. The first claim is that we can come to a rational consensus about substantive outcomes 'that a society committed to the democratic ideals of equality of concern and respect should achieve'.[11] The implication is that this society should conceive of such outcomes as the fundamental rights of the political order, codified in a constitutional bill of rights. The second claim in favour of judicial review is the claim that the judicial process is more reliable than the legislative process at identifying these outcomes. Bellamy disputes both claims.

Regarding the first claim, Bellamy argues that rights are subject to 'the circumstances of politics', which refers to 'a situation where we need a collectively binding agreement, because our lives will suffer without it, yet opinions and interests diverge as to what its character should be and no single demonstrably best solution is available'.[12] Importantly, these differences of opinion are not due to ignorance or self-interest. Adopting John Rawls' notion of 'the burdens of judgment',[13] which holds that different people will draw different conclusions even if they have access to the same information, Bellamy argues that disagreement is often *reasonable*. No matter the amount of information we gather, different

[10] Stephen Gardbaum recently argued for seriously considering the alternative of weak judicial review, which he calls the new Commonwealth model. He argues that 'whilst maintaining democratic legitimacy through the legal power of the final word, [the new Commonwealth model] provides a more secure, comprehensive and pluralistic scheme of rights protection', as it 'promises to enhance the quality of legislative rights debate': S Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013) p. 75–76.

[11] Bellamy, *supra* n. 3, p. 3.

[12] Bellamy, *supra* n. 3, p. 21. *See also* Waldron, *supra* n. 2, p. 102ff.

[13] J. Rawls, *Political Liberalism* (Columbia University Press 1993) p. 54–58.

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people will reach different conclusions because of the difficulties in interpreting data and in weighting different sets of data, because of the vagueness of concepts, and so on.

This claim is plausible enough: the entire history of moral philosophy has not managed to yield a consensus on which rights we do or do not have, or what obligations such rights entail, or how to weigh different rights. Philosophers, who pride themselves on their reasonable argumentation, may have inadvertently proven that reasonable argumentation is not enough to reach a consensus about rights. Note that neither Bellamy nor I claim moral relativism to be true.[14] Reasonable argumentation in political issues is crucial, but a consensus is by no means guaranteed.

Regarding the second claim, Bellamy argues that, given the fact that rights are subject to the circumstances of politics, judges are not more capable at finding the 'correct' answers to rights issues. On the contrary, Bellamy claims that legislatures are both more legitimate and more effective at resolving disagreements about rights. The legitimacy argument is often conceded, including by those advocating judicial review, as the democratic credentials of legislators are usually recognised to be greater than those of judges. But proponents of judicial review often claim that judges are more reliable at solving rights issues: the superiority of courts in finding the best answers is supposed to complement the legislature's superiority in finding the most legitimate answers. In the event of a clash between the two, the defenders of judicial review argue that priority should be given to the courts. According to Bellamy, however, courts are at most equally proficient at solving disagreement. He disputes all three reasons that are generally given for the superiority of courts.

According to Bellamy, the first reason given for the superiority of courts is that courts are supposedly especially suited for deciding rights issues, since courts deal with individual cases, and rights properly belong to individuals. Bellamy identifies at least two problems with his claim. First, not all rights belong to individuals. He gives the example of free speech, a right that defends a public good: it is valued most by journalists and politicians, while Bellamy claims it is rarely used by most citizens. Second, although courts try individual cases, judicial review creates public policy. In fact, it is for this reason that advocacy groups pursue legislative change through litigation: they hope that winning an individual's case will create rights for all citizens. Bellamy argues, however, that courts are an inappropriate forum for

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[14] As Waldron argues, we 'can recognize the existence of disagreement on matters of rights and justice ... without staking the meta-ethical claim that there is no fact of the matter about the issue that the participants are discussing': Waldron, *supra* n. 2, p. 244. Even if there is an objective answer, people still disagree about what that answer is. Compare Waldron's argument that the distinction between moral realism and moral anti-realism is not relevant to the debate on judicial review: Waldron, *supra* n. 2, p. 164-187.

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debating political issues, because determining public policy on the basis of a single case 'produces all sorts of distortions'.[15]

The second reason is that judges are supposed to be isolated from populist pressures, which enables them to deliberate in a disinterested fashion: they reason on the basis of moral principles and the law. There are several problematic assumptions in this claim, according to Bellamy. First, it ignores the link that often justifiably exists between interests and rights. For example, the interest to have your view considered in politics underlies the right to vote. Second, there is little reason to believe that self-interest is what motivates citizens. The 'rational voter paradox' seems to prove otherwise: 'the rationally self-interested voter stays at home', because 'the costs in time and shoe leather of going to vote invariably outweigh the probability of any benefit accruing from having done so'.[16] Third, reasoning on the basis of law alone might make for relatively predictable rulings but only in regular courts. What distinguishes a supreme court from regular courts is that it has the authority to overturn precedent.

The third reason given for judicial superiority is that courts provide a valuable counter-majoritarian check on legislatures. Again, Bellamy identifies several problems. First, it seems odd to claim that courts offer a counter-majoritarian check considering the fact that they decide by majority as well, not uncommonly by the narrowest of margins. This means that just one (possibly ill-argued) vote can decide the matter. Ironically, courts may be *more* vulnerable to the so-called pathologies of democracy. Second, courts are less independent than commonly asserted. Judges cannot afford to stray too far from public opinion: 'Their standing and authority gets questioned when they are consistently at odds with the public, making most judges highly reluctant to be so'.[17] And Bellamy thinks this may be for the best, as he contends that the influence of judicial review as a counter-majoritarian power need not be benign.

Bellamy argues that judicial review can result in an entrenchment of the status quo, for the simple reason that overturning a constitutional ruling requires a supermajority.[18] This means that a sizable minority can block reform. Moreover,

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[15] Bellamy, *supra* n. 3, p. 30.

[16] Bellamy, *supra* n. 3, p. 225.

[17] Bellamy, *supra* n. 3, p. 41.

[18] This is generally though not necessarily the case. *See* J.I. Colón Rios, 'The Counter-Majoritarian Difficulty and the Road not Taken: Democratizing Amendment Rules', 25 *Canadian Journal of Law and Jurisprudence* (2012) p. 53, for an argument for the removal of the supermajority requirement. This strengthening of legislative power to assuage the fears of the opponents of judicial review can be considered the alternative strategy to the weakening of judicial power in weak judicial review. It is worth noting, however, that relaxing amendment procedures negates the value of a constitution in entrenching a particular (democratic) procedure, safeguarding democracy against small or transient majorities with anti-democratic tendencies.

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judicial review 'raises the stakes for winners and losers alike'.[19] Bellamy contends that, although the US Supreme Court case of *Roe* v *Wade* is celebrated for its liberalisation of abortion, it may have done more to radicalise the issue. He claims that prior to this ruling there was a trend towards liberalisation in most states. Although it established abortion rights, the problem of *Roe* v *Wade*, Bellamy argues, is that it has not been able to build political support as ordinary legislative action could have done. Judicial review cannot build political support: 'For winning in law is rarely the end of the matter. It proves largely empty unless the decision also wins political support – and to the extent that it may either galvanise opposition or divert the activities of supporters elsewhere, may even work against political success'.[20]

According to Bellamy, none of the claims for judicial review hold up to scrutiny. In its stead, Bellamy argues for legislative superiority. Because rights are inextricably subject to the circumstances of politics, and because no privileged viewpoint exists, no court or third party arbitrator can decide whether a policy truly serves public interest. For the same reason, any attempt to depoliticise rights, to place them outside of the reach of ordinary legislation by entrenching them in a bill of rights, is arbitrary: 'The indeterminacy and contestability of rights means their, or indeed any other criterion's, use to demarcate the limits of politics is ... itself inextricably political'.[21] What, therefore, prevents the codification of rights from being the result of the biased view of a hegemonic group or of an elite?

Bellamy contends that the legislature is the one institution that can prevent arbitrariness, because it allows for input by citizens. This is where Bellamy's argument turns republican: only the democratic process is able to prevent domination. Whereas oppression issues from the unjust interference by an individual or by an institution, domination 'issues from an individual or body *possessing the power* wilfully to exercise such interference over others, or in other ways to ignore or override their opinions and interests'.[22] Bellamy therefore argues that judicial review, with courts capable of interfering with the legal rights of a polity, is dominating.

Bellamy argues that a process must satisfy two criteria for it to be non-dominating. First, no difference in status must exist between citizens and the decision-makers. Second, the reason that some views count for less cannot be because those views are 'wrong'. According to Bellamy, a 'standard democratic process meets these criteria in a fairly straightforward way'.[23] The imperative of

[19] Bellamy, *supra* n. 3, p. 43.
[20] Bellamy, *supra* n. 3, p. 44.
[21] Bellamy, *supra* n. 3, p. 149.
[22] Bellamy, *supra* n. 3, p. 151, emphasis added. *See also* Pettit (1997), *supra* n. 8, p. 52-66.
[23] Bellamy, *supra* n. 3, p. 165.

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maintaining non-domination also determines how the democratic process should be organised. The key quality in this regard is the need for decision-makers 'to hear the other side', 'most particularly those of their principals, the citizens'.[24]

For Bellamy, this means that the best way to ensure democratic legitimacy is to ensure a fair procedure that accords all citizens the same influence on the outcome, so that citizens can recognise the outcome as their own even though they may personally disagree. All attempts to ensure good outcomes Bellamy believes to be misguided: no independent metric exists with which to assess whether we have chosen the 'correct' rights, as rights are subject to the circumstances of politics. Bellamy therefore argues that 'all but procedural views of democracy offer arbitrary accounts of equal concern and respect'.[25] The only way to assess the democratic credentials of a polity is to judge its procedure.[26]

The two characteristics of democracy that ensure that decision-makers hear the other side, thereby ensuring a non-dominating procedure, are equal votes and majority rule. The equal vote guarantees that all citizens, including incumbent legislators, are accorded the same status. Furthermore, Bellamy argues that the mechanical nature of elections is an advantage, contrary to what is commonly held, as losing an election does not mean being 'wrong': 'The winners do not claim victory on the grounds that their judgment is superior in some way to that of the losers. Their success merely reflects their view having been endorsed by the majority of the political community'.[27] Hence, majority rule on the basis of equal votes guarantees that no view is arbitrarily favoured over another.

Bellamy believes that, in contemporary democracy, the guarantee for the equality of votes and for the fairness of majority rule is the fact that no consistent majority exists. He maintains that all majorities are coalitions of minorities. This

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[24] Bellamy, *supra* n. 3, p. 196.

[25] Bellamy, *supra* n. 3, p. 214. Compare Waldron's argument that the right to participate in decision-making procedures is not in conflict with other rights but, rather, remarkably appropriate when citizens disagree *about* those other rights. There is, he argues, 'something unpleasantly inappropriate and disrespectful about the view that questions about rights are too hard or too important to be left to the right-bearers themselves to determine': Waldron, *supra* n. 2, p. 252.

[26] This does not mean that Bellamy believes that courts should be allowed to judge the democratic process to ensure its legitimacy, as John Hart Ely famously argued. *See* J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980). Bellamy maintains that 'an imperfect democratic procedure through which citizens have some chance of having their say can be reasonably preferred to one that has fewer democratic credentials': Bellamy, *supra* n. 3, p. 140. In evaluating (and improving) democracy, therefore, even flawed democratic processes are to be preferred over courts. Waldron makes a similar point, arguing that 'there is always a loss to democracy when a view about the conditions of democracy is imposed by a non-democratic institution, even when the view is correct and its imposition improves the democracy': Waldron, *supra* n. 2, p. 302.

[27] Bellamy, *supra* n. 3, p. 226.

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'balance of power' between minorities guarantees, according to Bellamy, that all views are taken into consideration by the legislature.[28] Because no single party, being a minority, can rule independently from other parties, it cannot afford to exclude their viewpoints outright. Excluding any party will lead to a (too) narrow power base or an unnecessary obstacle to forming a new coalition. Thus, 'any given minority either has a good chance of being part of a future winning coalition, or – for that very reason – is likely not to be entirely excluded by any winning coalition keen to retain its long-term power'.[29]

For Bellamy, it is equally important that such a balance of power exists between political and societal elites. The paradigm case is the separation of church and state, which Bellamy considers crucial not for state neutrality but for 'preventing governments from claiming a monopoly of moral authority'.[30] The separation of church and state ensures that legislators are susceptible to moral criticisms from without, not just from other legislators. By denying the government a monopoly on a particular discourse, we ensure that political elites have to contend with other elites in society. This balance of power between legislature and society complements the balance of power between political parties.

The results are often compromises, which, contrary to popular criticisms, are not unprincipled bargains. Rather, they can be seen as 'products of the mutual recognition by citizens of the reasonableness of their often divergent points of view', by trying to accommodate different views within a public policy.[31] A compromise is 'hearing the other side' put into practice. Accordingly, legislative politics does not override minority rights; rather, its very nature protects minority rights. This means that, according to Bellamy, the argument that judicial review is needed to correct for democracy's problems is 'aimed at a straw target'.[32]

Bellamy's case against judicial review depends on a strong faith in electoral and legislative politics. For him, this constitutes most – though not all – that makes a democracy. In contemporary democratic theory, this seems like an odd position, since most hold that electoral politics alone is insufficient to speak of a 'mature' democracy. Bellamy is by no means unaware of this: 'the very aspects many legal and political theorists are apt to denigrate . . . are what I seek to praise'.[33] Although

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[28] Bellamy's distrust of constitutional provisions leads him to adopt a mechanism of reciprocal power, the very mechanism that Pettit rejects as a means to achieve non-domination. Pettit believes that, though it may play a subordinate role, there is 'very little reason to be attracted to the strategy of reciprocal power as a general means of advancing people's freedom as non-domination': Pettit (1997), *supra* n. 8, p. 95.

[29] Bellamy, *supra* n. 3, p. 238. This is especially true of multi-party democracies, yet Bellamy holds that the parties in a two-party democracy are similarly coalitions of different groups.

[30] Bellamy, *supra* n. 3, p. 205.

[31] Bellamy, *supra* n. 3, p. 193.

[32] Bellamy, *supra* n. 3, p. 259.

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I believe Bellamy is right to defend those aspects of democracy so often criticised, his picture of electoral politics is too rosy.

Rosanvallon's legitimacy of reflexivity

Pierre Rosanvallon offers a much more nuanced picture of contemporary democracy. Despite the differences in their positions, I contend that Rosanvallon's analysis shares several important ideas with Bellamy's argument for democracy, which indicates that Bellamy's conception of democracy is not incompatible with constitutional oversight. One of Rosanvallon's main claims is that citizens no longer view elections as mandates for politicians or parties to shape future policy: 'Hence democratic politics can no longer be analyzed solely in terms of conflicts of interest and compromise, modes of aggregation of individual preferences, or factors shaping public opinion'.[34] Instead, what has become the primary motivation for voters is to *revoke* authority for perceived failures regarding adopted policies.

According to Rosanvallon, this 'politics of distrust'[35] pervades the realm of politics. He maintains that, since ideological competition has declined in the post-Cold War world, the prospect of a decisive change in policy has disappeared. Together with increasing complexity, leading to opaque decision-making, Rosanvallon believes this has led to a preference for judgment, both of policies and of politicians. Hence, 'the judicialization of politics is related to a decline of government responsiveness to citizen demands'.[36] Clearly, Rosanvallon considers contemporary democracy to be in a rather different situation than Bellamy, justifying a specific term: counter-democracy.[37]

Both conscious of extra-parliamentary politics and a lot more sympathetic to the role of judgment in politics, Rosanvallon offers a different view of what democracy is or, rather, to what kind of democracy we should aspire. He believes democracy can no longer be conceived solely in terms of competitive elections. Rather, majority rule should be understood as 'a mere *empirical convention*, which remains subject to the need for higher levels of justification. Its legitimacy is

[33] Bellamy, *supra* n. 3, p. 210.

[34] P. Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust*, trans. A. Goldhammer (Cambridge University Press 2008) p. 179.

[35] Rosanvallon, *supra* n. 34, p. 181.

[36] Rosanvallon, *supra* n. 34, p. 228.

[37] Note that this term by no means refers to *anti*-democratic tendencies. Rather, the term denotes the ways in which democratic politics takes place beyond traditional electoral politics. Rosanvallon's analysis is directly relevant for anti-democratic tendencies, however, as he argues that populism is the pathological form of 'counter-democracy', radicalising its three aspects of oversight, prevention, and judgment.

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imperfect and must be strengthened by other modes of democratic legitimation'.[38] The main idea is that there is not just one way of representation, of speaking on behalf of society. Rosanvallon identifies three such modes of legitimation, of which the third is of most importance to this article.

The first form of legitimacy is that of impartiality, embodied primarily by independent authorities. The legitimacy of impartiality refers to a *negative generality*, which may be seen as a result of the 'desacralization of elections',[39] the idea that elections have lost the capacity to generate legitimacy. The electoral majority no longer corresponds to 'the people' as divisions in society have become apparent. As a consequence, independent authorities have been set up. The negative generality of independent authorities involves placing important aspects of society outside the reach of particular interests.[40] Regulation of broadcast media or of monetary issues, for example, is deemed to be too important to be left in the hands of partisan politics.

Second, Rosanvallon identifies proximity as a form of legitimacy. Proximity does not correspond to democratic institutions – as the first and third forms of legitimacy – but to the way in which citizens are governed. According to Rosanvallon, citizens are no longer satisfied with an aloof and distant government, valuing legal equality and distance from every particularity above all. Instead, a wish to take into account all situations lies at the heart of this *generality of attention to particularity*. Whereas the legitimacy of impartiality seeks freedom from particularity, the legitimacy of proximity leads in the opposite direction. This form of generality is attentive to the personal histories of citizens: 'It is by immersing oneself in particularities deemed to be exemplary that one gives palpable solidity to the idea of a "people". Generality is thus conceived as that which equally honors all particularities'.[41] Representation is no longer conceived as mere identification between representative and electorate. Rather, representation has become an ongoing process.

Third is the legitimacy of reflexivity, which refers to a *generality of multiplication*. Because electoral majorities fail to embody something like a general will, the results of an election are insufficient to constitute generality. The (outdated) electoral-representative democracy is based on three assumptions: 'the voters' choice is equated with the general will; the voters are equated with the people; and all subsequent political and legislative activity is assumed to flow

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[38] Rosanvallon, *supra* n. 9, p. 14, emphasis in the original.

[39] Rosanvallon, *supra* n. 9, p. 69-71.

[40] Removing policy questions from ordinary politics may actually fuel populism when these issues are perceived to be beyond democratic control. Oversight may therefore be especially prone to radicalisation. *See also* C. Pinelli, 'The Populist Challenge to Constitutional Democracy', 7 *EuConst* (2011) p. 5 at p. 12-14.

[41] Rosanvallon, *supra* n. 9, p. 191.

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continuously from the moment of the vote'.[42] The fact that these assumptions are flawed needs no demonstration, according to Rosanvallon. It is the aim of reflexive democracy to multiply approaches in order to achieve a more comprehensive view.

The first of these multiplications, Rosanvallon argues, is a response to the fact that we have to acknowledge that 'the people' is not a monolith. It can only be perceived in three different guises: the electoral people, the social people, and the people as principle. Each of these images of the people is expressed differently. The electoral people corresponds to the numerical majority of the election; the people as principle refers to the inclusivity inherent in the ideals of respect for and dignity of each individual; the social people refers to the sum total of various forms of contestations by minorities, revealing injustices in society, unified only by the dynamic that it forms between different groups of citizens. We need all three images: 'None of the three can by itself claim to be an adequate incarnation of the democratic subject'.[43]

Second, like the pluralisation of the image of the people, we must pluralise temporalities. Democracy is itself a function of time, according to Rosanvallon. It acquires meaning only through time; a democracy that only considers the decision in the 'now' undermines the identity of the polity. Democracy, therefore, must combine several temporalities: 'The vigilant time of memory, the long term of constitutional law, the limited time of a parliamentary mandate, and the short term of public opinion must constantly be juggled and adjusted so as to give substance to the democratic ideal'.[44] All political decisions regarding policy and law must be related to the different long-term perspectives of democracy.

Lastly, democracy requires the pluralisation of discourses. Democracy cannot be limited to a periodic election of representatives, because the ballot box reduces the diversity of arguments and motives. Although a periodic reduction of political opinions to a single language is necessary according to Rosanvallon, it cannot negate diversity. The 'common language' of the ballot box cannot represent the diversity of society: 'It is therefore important to improve the *quality* of public debate'.[45] The point of the matter is that we must hear all voices; public reason requires that we do not exclude quieter voices.

One of the institutions that correspond to this legitimacy of reflexivity is the institution of judicial review.[46] The purpose of constitutional oversight in Rosanvallon's reflexive democracy is not just to apply oversight but also to increase

[42] Rosanvallon, *supra* n. 9, p. 123.

[43] Rosanvallon, *supra* n. 9, p. 132.

[44] Rosanvallon, *supra* n. 9, p. 133.

[45] Rosanvallon, *supra* n. 9, p. 134, emphasis in the original.

[46] Note that it is not the only institution that corresponds to this kind of legitimacy. Rosanvallon mentions civil society organisations and social movements as well. These, however, are not elaborated upon.

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the power of citizens over their institutions by instituting a competing expression of the general will. Courts represent the people as principle, complementing the other guises of 'the people': 'They establish a permanent confrontation among the various manifestations of "the people," and especially between the people of the ballot box and the people as principle'.[47] These two guises of the people are not rivals of each other, but, according to Rosanvallon, a hierarchy between them does exist: in a democracy, the election will always have the last word.

Rosanvallon connects this representation of the people as principle with the pluralisation of temporalities. Whereas the electoral people is interpreted in terms of immediacy, since it refers to the result of a single election-day, the people as principle must be interpreted in a longer timeframe. A constitution represents the principle on which a nation rests – and Rosanvallon claims that the nation can only be perceived as long as it is represented – so that the identity of democracy is preserved. A constitution prevents the present from neglecting to consider the future: 'Majority power is limited by the principle that all citizens are equal in the face of the future'.[48] The fear that this temporal dimension of democracy means that citizens are bound by the laws enacted by previous generations Rosanvallon believes to be exaggerated. He thinks that the contemporary 'cult of presentism'[49] is more dangerous than any legal fetters can be. It is more important that we are aware of the temporal dimension of democracy; otherwise we risk losing its very foundation.

A third way in which judicial review complements electoral politics is through an enhancement of political debates. According to Rosanvallon, this is particularly true in France, where the Constitutional Council can judge proposed legislation for its constitutionality *ex ante*. While compulsory for organic laws, other legislation can be referred to the Constitutional Council by a parliamentary minority – particularly relevant for controversial legislation. Thus, constitutional oversight reopens 'important political debates in order to introduce new forms of argument' based on a 'more objective approach', as Rosanvallon contends that judicial review is constrained by the techniques of legal reasoning.[50] This introduces a different perspective in legislative debates, which largely revolve around ideological viewpoints.

This means that the 'diversification of temporalities and images of the social' by courts is matched 'by a duality in styles of argument'.[51] For Rosanvallon, judicial review is a crucial part of democracy, which can no longer be understood in purely

[47] Rosanvallon, *supra* n. 9, p. 141.
[48] Rosanvallon, *supra* n. 9, p. 143.
[49] Rosanvallon, *supra* n. 9, p. 144.
[50] Rosanvallon, *supra* n. 9, p. 146.
[51] Rosanvallon, *supra* n. 9, p. 146-47.

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electoral-representative terms: 'No one believes any longer that democracy can be reduced to a system of competitive elections culminating in majority rule'.[52] Although Rosanvallon seems overconfident in this claim, he considers the waning of such beliefs an important development.

Strong and weak judicial review

Rosanvallon paints a rather different picture of democracy than Bellamy. It suggests that Bellamy has a naïve conception of electoral politics. But that may be an unfair accusation, since Bellamy does not claim that democracy is coterminous with periodic elections: 'Deliberation, consensus, direct citizen participation through social movements, consultative juries and other mechanisms besides the ballot box – these all have their place, but a secondary one'.[53] However, he does not elaborate upon this claim. *Political constitutionalism* is limited to the scope of electoral politics.

The problem with Rosanvallon's analysis, however, is that his insistence on judicial review may exacerbate the problems of 'unpolitical democracy'.[54] This term refers to a trend in which citizens are more afraid of worsening their situation than that they are hopeful of improving it. This has led to the tendency of citizens to react quickly and strongly to proposed legislation if it is thought to be detrimental to their situation. As a consequence, politicians have become reluctant to propose ambitious legislation. This, in turn, has resulted in a stronger preference for judicial review: 'The indirect approach to modifying the law by way of the courts can be more effective than direct support for a political agenda. Judicial activists in a sense become "shadow legislators" who encourage reinterpretation of existing laws'.[55] In this way, the reluctance of politicians to act leads to a trend towards legislation by courts, which in turn confirms the image of an ineffective legislature.

The 'counter-democracy' of Rosanvallon's analysis appears to be a self-sustaining and self-reinforcing process. The use of courts to complement or, rather, supplant ordinary legislation exacerbates the problem of a reluctant and ineffective

[52] Rosanvallon, *supra* n. 9, p. 219.

[53] Bellamy, *supra* n. 3, p. 210.

[54] Rosanvallon, *supra* n. 34, p. 256. For a critique of Rosanvallon on this point, *see* N. Urbinati, 'Unpolitical Democracy', 38 *Political Theory* (2010) p. 65.

[55] Rosanvallon, *supra* n. 34, p. 226. Such reinterpretation by judges may also affect constitutional law. In India, constitutional amendments require review by the judiciary, whereas the Supreme Court can reinterpret existing provisions without analogous review by parliament. For those seeking constitutional change, therefore, the judiciary is deemed more effective than parliament. *See* S. Rajagopalan, 'Constitutional Change: A Public Choice Analysis', in S. Choudhry et al (eds.), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) p. 127.

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legislature. This actually increases the risk of the pathological form of counter-democracy: populism. If issues are perceived to be beyond the control of voters, it can legitimise the perception of a political 'elite'. Judicial review cannot be a solution for the impotence of legislation. It will only increase its impotence. Employing courts in legislative projects is misguided, even according to Rosanvallon's analysis.

How, then, could one make use of all the benefits that Rosanvallon identifies in the function of courts, considering this problem of legislative impotence? A solution, I contend, lies in weak judicial review. It is significant in this context that, notwithstanding his case for judicial review, Rosanvallon maintains that 'elections always have the last word' in a democracy.[56] Even though, technically, in both weak and strong judicial review the legislature will have the last word, accepting the primacy of electoral politics should make us favour weak over strong judicial review, since in the latter the legislature is (generally) only able to redress a mistaken constitutional ruling with a supermajority. Strong judicial review, therefore, has a much greater potential of confirming a legislature's impotence. In weak judicial review, on the other hand, a legislature is not forced to act – although it receives a strong moral, political, and legal appeal to do so.

The fact that Bellamy argues against *all* forms of judicial review should not dissuade democratic critics, because his argumentation fails to convince. His argument against weak judicial review is based on the claim that even a declaration of incompatibility, in the British style of judicial review, will effectively decide the matter, because in that case a legislature has to overcome a very high moral and political threshold. Refusing to heed the declaration of incompatibility invites the risk of 'being condemned for playing fast and loose with rights rather than as offering a different account of them'.[57] Thus, Bellamy argues, even a declaration of incompatibility overpowers a legislature.

This difference between theory and practice has led Aileen Kavanagh to cast doubt upon the idea of characterising the British style of judicial review as 'weak'. She notes that experience shows that Parliament has almost without exception followed the courts' interpretation by amending legislation due to perceived political costs in ignoring declarations of incompatibility. Kavanagh claims 'that, quite often, the government does not want the last word and is quite happy to let the courts make the decisions on these questions'.[58] The 'weakness' of the British system is undermined even further by the courts' ability to modify the meaning of

[56] Rosanvallon, *supra* n. 9, p. 141. On the significance of legislatures having the 'final word' in weak judicial review as a third model of constitutionalism, distinct from both judicial supremacy and legislative supremacy, *see* Gardbaum, *supra* n. 10.

[57] Bellamy, *supra* n. 3, p. 48.

[58] Kavanagh, *supra* n. 5, p. 1022.

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legislation so that it *becomes* compatible with the Human Rights Act. Kavanagh contends that it could be argued that this allows the British courts to 'engage in a stronger form of displacement' than courts in a system of 'strong-form' judicial review.[59]

Although the reinterpretation of existing legislation beyond legislative intent is problematic from a democratic standpoint, and is therefore an aspect of the British style of review that democratic critics will be adamant to avoid, the declaration of incompatibility is not. The latter cannot be construed as, in republican terminology, a court dominating the legislature and, indirectly, the citizenry. A declaration of incompatibility amounts to little else than an authoritative advice, or a compelling appeal; courts have no capacity to actively interfere and therefore cannot dominate. The fact that the *outcome* is similar to strong judicial review is a weak argument, since Bellamy prioritises considerations of *procedure*.[60] Bellamy's argument against weak judicial review therefore contradicts one of his core principles. In weak judicial review, courts cannot determine rights without involvement of the legislature; the outcome becomes similar only when legislators are hesitant to contradict a court's opinion, fearful as they may be of public opinion.[61] If Bellamy were to claim that this constitutes domination, then the effect would be that *public opinion* is dominating. This appears to have the result that non-domination contradicts political life, whereas Bellamy explicitly argues that it is uniquely compatible with political society.[62] Bellamy's argument against weak judicial review is therefore inconsistent with his account of democracy.

The democratic legitimacy of judges

If we follow Rosanvallon and accept that democracy requires more than a monolithic 'general will' established through elections, and that it needs the pluralisation and diversification of democratic expression – or the duty to 'hear the other side' – Rosanvallon's case for judicial review becomes much more attractive. Democratic critics insist, however, that the democratic legitimacy of courts falls short of that of legislatures. And, as Jeremy Waldron argues, this comparative weakness precludes us from adopting strong judicial review: 'Because different institutions and processes might yield different results, defending the legitimacy of a given institution or process involves showing that it was or would be fairer than some other institution or process that was available and might have reached the

[59] Kavanagh, *supra* n. 5, p. 1019.

[60] Bellamy, *supra* n. 3, p. 210-221.

[61] *See* Kavanagh, *supra* n. 5, p. 1023-1028; *see also* J.L. Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' 69 *Modern Law Review* (2006) p. 7 at p. 19-26.

[62] Bellamy, *supra* n. 3, p. 158-159.

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contrary decision'.[63] My aim, however, is not to argue for strong judicial review, and I will therefore not attempt to establish that courts are equally legitimate as, or even more legitimate than legislatures. Rather, my goal in this section is to examine how weak judicial review allows courts to *enhance* the legitimacy of the democratic process.

For Rosanvallon, the legitimacy of judicial review is derived from the fact that reflexivity is a requirement of democratic government: thus, it acquires a 'functional legitimacy'.[64] And in order to ensure that courts exercise this function, they must be structurally different from legislatures: election of judges undermines their capacity for reflection, as the court will become a partisan institution. Furthermore, Rosanvallon argues that the legitimacy of courts is enhanced when we require 'judges to explain their decisions in detail. In this way, judicial decisions are transformed into careful articulations of the public interest'.[65] Hence, the duty to carefully explain their decisions establishes a court's legitimacy and assures that it decides in the name of the people.

However, such explanation and argumentation is not unique to courts. And to claim a difference in *quality* of argumentation between courts and legislatures is, according to Waldron, not accurate.[66] Moreover, Waldron thinks that the elaborate reasoning by judges is informed by their own concerns of legitimacy; their reasoning has to establish that they are 'legally authorized – by constitution, statute, or precedent – to make the decision they are proposing to make'.[67] Judges have good reason for this sort of argumentation establishing jurisdiction, but it does not address the heart of the matter itself, whereas Waldron claims that legislators do tend to directly address the issue at hand.

The democratic legitimacy derived from a court's argumentation is therefore less persuasive than that derived from a legislature's debates. Waldron even argues that attempting to establish the democratic credentials of judges may be counterproductive or paradoxical, because 'to the extent that we accept judges because of their democratic credentials, we undermine the affirmative case that is made in favor of judicial review as a distinctively valuable form of political decisionmaking'.[68] Hence, we should not argue for courts' democratic credentials in the same terms as those of legislatures. Instead, I want to analyse how courts, in weak judicial review, enhance the democratic legitimacy of a polity's decision-making process.

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[63] Waldron, *supra* n. 6, p. 1389.
[64] Rosanvallon, *supra* n. 9, p. 155.
[65] Rosanvallon, *supra* n. 34, p. 306.
[66] Waldron, *supra* n. 6, p. 1382-1383.
[67] Waldron, *supra* n. 6, p. 1384.
[68] Waldron, *supra* n. 6, p. 1394.

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There are two arguments for why a court enhances democratic legitimacy. These arguments are part of Annabelle Lever's defence of the democratic character of judicial review.[69] The first argument is Lever's assertion that there is a specific kind of representation that is unique to courts: descriptive representation. Whereas electoral representation refers to the fact that decision-makers are chosen by the citizens, this 'is often at odds' with descriptive representation, which refers to the notion that all groups of society ought to be represented in positions of power in proportion to their numbers.[70]

According to Lever, this is not merely relevant for an equality of opportunity, but especially because there are also epistemological considerations: each subgroup of society may have biases of its own. Descriptive representation is – *in general* though not *in principle* – an ideal to which legislatures do not conform, as women and minorities are often underrepresented. Ideally, courts conform to such descriptive representation, thereby establishing a distinctive democratic legitimacy. We should keep in mind, however, that this depends on whether the appointment of judges actually succeeds in realising descriptive representation. Although selection of judges allows for more deliberate considerations, courts can still exhibit the same shortcomings as legislatures.

The second argument is that the institutional features of courts allow for contestation by citizens, on the basis of arguments different from political arguments: 'strong judicial review has one unique and important advantage: that it enables citizens to challenge their governments in the same ways and on the same grounds through which they challenge other individual and collective agents'.[71] This, however, is not unique to strong judicial review. Weak judicial review allows for the same challenge of legislation by individual citizens and interest groups. Such legal contestation allows for citizen participation in a distinct, more substantial way than voting.

These two institutional features enhance the otherwise *relatively* weak democratic character of courts. Obviously, judges are not simply undemocratic. Judges aim to represent the people, and they often succeed. This becomes clear from the fact that,as Lever writes, 'while they may be willing to lead public opinion for a while, they rarely stray from it for too long'.[72] This view is shared by Bellamy, as he acknowledges that 'courts … tend not to be out of step with the popular will for long'.[73] Judges are aware of public opinion, even though they may not be bound by it to the same extent as legislators. Although this representation of

[69] A. Lever, 'Democracy and Judicial Review: Are They Really Incompatible?', 7 *Perspectives on Politics* (2009) p. 805.

[70] Lever, *supra* n. 69, p. 810.

[71] Lever, *supra* n. 69, p. 813.

[72] Lever, *supra* n. 69, p. 812.

[73] Bellamy, *supra* n. 3, p. 40-41.

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public opinion is comparatively weaker than that of legislatures, it is complemented by the distinctive ability of courts to improve representation, and the distinctive form of legal argumentation that can enhance participation and the quality of public debate.

The case for weak judicial review in the democratic critique

Recognising that courts are not 'undemocratic', the argument that any influence of judges is anti-democratic turns out to be unfounded. Indeed, even Bellamy implicitly admits that judges are not wholly undemocratic, in his claim that judges are less independent from public opinion than commonly asserted by advocates of judicial review. Moreover, Bellamy fails to offer a persuasive case against weak judicial review.

Bellamy's argument that weak judicial review leads to the same outcomes as strong judicial review is a particularly odd argument for someone who argues we should judge a democracy for its procedure rather than its outcomes. He may be right that the outcomes are similar: Janet Hiebert suggests that weak judicial review changes the political culture to such an extent that it 'could reduce significantly the difference associated with this model'.[74] But judging a decision-making process for its outcomes is precisely what Bellamy argues we should not do, which invalidates his argument against weak judicial review. And crucially, for the democratic critics, the legislature will be able to make the final decision. Moreover, political reform necessarily intends change, often regarding political outcomes. A reform without political change would be essentially meaningless.

Furthermore, Bellamy's rejection of weak judicial review is at odds with his argument for a balance of power, which holds that, '[i]n many respects, it is as important, if not more so, to ensure that political elites not only have to compete with each other but also with other elites in the economy and society'.[75] Bellamy offers no reason for the apparent distinction between a societal elite – like a non-profit organisation, a trade union or a religious institution – that Bellamy thinks crucial, and a judicial elite in the framework of weak judicial review. The fact that a government has to overcome a very high political and moral threshold in the case of weak judicial review applies equally to the appeals of a societal elite. That is precisely what makes societal elites *effective*: ignoring situations in which, say, a well-known religious leader accuses the government of violating certain rights comes at a high political cost.

In this framework, the majority voting of courts, criticised by Bellamy, is actually quite appropriate. Analogous to elections, in which a large majority is

[74] Hiebert, *supra* n. 61, p. 28.
[75] Bellamy, *supra* n. 3, p. 205.

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perceived as a strong mandate, a court ruling with a large majority makes for a strong appeal. The stronger the appeal, the more it may encourage the legislature to act or the more it may galvanise public opinion against the law in question. A court's majority vote simultaneously acknowledges that differences in interpretation are reasonable, meaning that a dissenting legislator is not a 'rights violator' by default, just as a dissenting judge is not a rights violator.

If legislators cannot justify a different conception of rights, not even with a dissenting opinion in hand, then the electorate apparently does not share this alternative view of rights. The primary cause for being labelled a rights violator is that public opinion is on the side of the court. In that case, the legislature's disagreement with a court has revealed a gap between the views in the legislature and the views in society. The fact that a legislature rarely withstands the ruling of a court shows that, apparently, citizens feel secure with courts' interpretations as public opinion often sides with the court.

Weak judicial review therefore operates similarly to the separation between state and church, which precludes legislators from claiming a monopoly on morality, as it precludes legislators from claiming a monopoly on legal authority. Rosanvallon provides an example of precisely such a claim. In France during a parliamentary debate in 1981, a Socialist deputy repudiated the opposition by saying: 'You are legally in the wrong because you are politically in the minority'.[76] This claim expresses an unambiguous view of pure majoritarianism. Rosanvallon considers it a significant improvement that, in France, a law is now considered to express the general will only insofar as it respects the constitution.

Separating legislative majority and legality does not mean that a majority cannot determine legality in its own ways, just as the separation of legislative majority and morality does not imply that a legislature cannot take a moral position. It only means that the legislative majority cannot claim to be the *only* authority to determine legality. By denying a legislature the monopoly on legal authority through weak judicial review, the political debates of legislatures are supplemented by the legal perspective of courts. In Rosanvallon's terminology, weak judicial review involves a pluralisation of discourses; in Bellamy's terminology, it means hearing the other side.

Because the last word lies with the legislature, weak judicial review is not 'the strategic use of deliberation as an antidote against democratic politics itself', as one critic imputes to Rosanvallon.[77] This charge is valid if we take Rosanvallon's case for judicial review as an argument for strong judicial review. Weak judicial review, however, is more consistent with his claim that elections always have the last word. Moreover, weak judicial review fosters openness to revision by the legislature

[76] André Laignel, quoted in Rosanvallon, *supra* n. 9, p. 146.
[77] Urbinati, *supra* n. 54, p. 68.

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through pluralising input. This corresponds with Rosanvallon's stated purpose of judicial review, which is 'to increase the power of citizens over institutions', particularly over the legislature, by providing alternative means of expression of the general will.[78] Thus, citizens may compel the legislature to reopen debate by introducing a new perspective.

Allowing for contestation by citizens ensures that legislators may be confronted with views that were unrepresented. Such citizen contestation enables what Rosanvallon calls attention to particularity. Although he does not develop this concept in the framework of judicial review, it is clear that citizens' access to legislative debates, through the use of legal procedures, enables new forms of interaction between citizens and legislators.[79] Weak judicial review is therefore distinct from a governmental advisory organ, as it provides access to cases brought by citizens. The right to participate in decision-making procedures, championed by the democratic critics of judicial review,[80] gains new significance: the ability to challenge the government in court, similar to the ability to challenge fellow citizens, provides a new way of participating in political decisions.[81]

Conclusion

Both Bellamy's argument against judicial review and Rosanvallon's argument for judicial review are problematic. Neither manages to establish his case convincingly. However, both arguments are more compelling in the framework of weak judicial review. Bellamy's argument against all forms of judicial review is internally inconsistent. First, his argument against weak judicial review is based on outcome considerations, contradicting his own principle of focusing on procedures instead. Second, he cannot justify the distinction between moral and judicial elites, as both of these elites prevent a government from claiming a monopoly on a particular discourse. Although Bellamy admits that mechanisms outside the ballot box are important, he fails to realise that weak judicial review is precisely one example of such mechanisms. Rosanvallon's case for judicial review, on the other hand, is inconsistent as a case for strong judicial review; Rosanvallon

[78] Rosanvallon, *supra* n. 9, p. 139.

[79] *See also* Pettit (1997), *supra* n. 8, p. 195-200, for the importance of creating forums for contestation in a (republican) democracy.

[80] Waldron calls it 'the right of rights.' Waldron, *supra* n. 2, p. 232-254.

[81] *See also* Y. Eylon and A. Harel, 'The Right to Judicial Review', 92 *Virginia Law Review* (2006) p. 991. Eylon and Harel reconceptualise judicial review in terms of the right to participation. They argue that citizens have a *right* to judicial review derived from the right to a hearing, implying that (strong) judicial review does not conflict with democracy. However, Eylon and Harel ignore the fact that, though citizens participate, the decision is made by judges. And for Bellamy, as for other democratic critics, 'it is not just debating but also deciding that matters': Bellamy, *supra* n. 3, p. 97.

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identifies a problem with judgment in politics, as it undermines a legislature's room to act. This means that strong judicial review cannot be a viable option. A case for weak judicial review, on the other hand, possesses the same capacity for a pluralisation of discourses in political debates, if not more.

The fact that the arguments of both Bellamy and Rosanvallon are more consistent when they acknowledge weak judicial review as a viable alternative shows that the divide in the debate on judicial review of legislation is misplaced. The democratic critique as it currently stands does not preclude weak judicial review. On the contrary, it actually supports weak judicial review. Both proponents and opponents of judicial review may therefore find an answer to their concerns in weak judicial review. The critics of judicial review, who argue on the basis of democratic concerns, find that it is the legislature that has the last word. The defenders of judicial review are generally concerned with the possibility of legislatures and electorates 'getting it wrong'. Because weak judicial review creates an additional hurdle for prejudiced or inequitable majorities, which in practice may even lead to outcomes similar to strong judicial review, the probability of unjust or unreasonable decisions is drastically decreased.

Weak judicial review, therefore, concedes the deontological point – the importance of democratic participation – to the critics, while experience shows that weak judicial review concedes the consequentialist point – the importance of good results – to the defenders of judicial review. Weak judicial review is therefore not merely an appealing alternative to either judicial or legislative supremacy. Rather, it is an alternative that is supported by the democratic critique of judicial review, while defenders of judicial review may be sympathetic to the enhanced rights protection, as indicated by experience, that is offered by weak judicial review.

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